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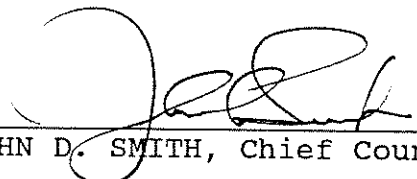
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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:) 1990 OAL Determination No. 11
)
Request for Regulatory) [Docket No. 89-018]
Determination filed by)
Musick, Peeler & Garrett) July 31, 1990
regarding a policy of)
the Division of Labor) Determination Pursuant to
Standards Enforcement) Government Code Section
requiring employers to) 11347.5; Title 1, California
pay for meal periods of) Code of Regulations,
employees who are) Chapter 1, Article 2
required to remain on)
employment premises)
)

Determination by:


JOHN D. SMITH, Chief Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not an enforcement policy of the Division of Labor Standards Enforcement, which states that employers who require employees to remain on the employment premises during a meal period must compensate the employees for that meal period, even when the employees are relieved of all duties, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this enforcement policy is not a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not an enforcement policy of the Division of Labor Standards Enforcement ("DLSE") is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA"). The enforcement policy states that employers are required to compensate employees for meal periods "as hours worked" when they are required to remain on the employment premises during meal periods, even when the employees are relieved of all duties.

THE DECISION ^{4 5 6 7 8}
, , , , ,

OAL finds that:

- (1) the Division's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged enforcement policy is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b), but is merely an application of existing law to a particular set of facts without further interpreting or supplementing the law; and therefore,
- (3) the enforcement policy does not violate Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

A cabinet-level agency, the Department of Industrial Relations ("Department") was first created in 1921 as the Department of Labor and Industrial Relations.¹⁰ In 1927, the Legislature gave the agency its present name.

Within the Department, there is the Division of Labor Standards Enforcement¹¹ ("DLSE" or "Division"), created in 1976 by the enactment of Labor Code sections 82 and 83.¹² The California Labor Commissioner is Chief of DLSE.¹³

DLSE is responsible for enforcing various provisions of the California Labor Code, including those involving wages, hours and working conditions.¹⁴ DLSE also investigates employee complaints, resolves claims for wages and benefits and may provide for a hearing in any action to recover wages, penalties, and other demands for compensation.¹⁵

Authority ¹⁶

Due to the complexity of the organization of the Department of Industrial Relations, the extent of DLSE's rulemaking power is not readily apparent.¹⁷ As this matter comes before us solely in the context of a request for regulatory determination, however, we need not reach any definitive conclusions with respect to the issue of "authority." (See note 16 for additional discussion.)

Background: This Determination

To facilitate better understanding of the issues presented in this determination, we set forth the following relevant statutes, Industrial Welfare Commission orders contained in the California Code of Regulations ("CCR"), and undisputed facts.

Labor Code section 1193.5 states in part:

"The provisions of this chapter [chapter 1, part 4 of the Labor Code, sections 1171-1204] shall be administered and enforced by the division [DLSE]
. . . ."

Labor Code section 1198.4 provides in part:

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"Upon request, the Chief of [DLSE] shall make available to the public any enforcement policy statements or interpretations of orders of the Industrial Welfare Commission. . . ."

The Industrial Welfare Commission ("Commission" or "IWC") is also within the Department of Industrial Relations.¹⁸ The Commission, following unique rulemaking procedures that date back to the World War I era, adopts regulation orders that govern wages, hours, and working conditions in fifteen different industry and occupation categories.¹⁹ Labor Code section 1185 provides:

"The orders of the commission [IWC] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter [Chapter 1 ("Wages, Hours and Working Conditions"), Part 4 of the Labor Code], shall be valid and operative and such orders are hereby expressly exempted from the provisions of [the APA]. [Emphasis added.]"

These orders are located in Title 8, sections 11010 through 11150, of the CCR.²⁰ As noted above in Labor Code section 1185, these orders, though printed in the CCR, are not subject to the APA's procedural requirements or substantive review by OAL.

In each order section, except as noted below, under subsection 2 ("Definitions"), the term "Hours worked" is defined as:

"'Hours worked' means the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

Additional language appears in the definition of "Hours worked" in section 11050, which governs the Public Housekeeping Industry. This term is defined in subsection 2 as:

"'Hours worked' means the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so, and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

On September 28, 1989, Richard J. Simmons ("Requester"), an attorney with Musick, Peeler & Garrett, submitted to OAL a Request for Determination challenging DLSE's enforcement policy that

"whenever an employer requires its employees to remain on the [employment] premises for meal periods, it is exerting control and must pay for that time as 'hours worked' even if the employees are relieved of all other job duties."²¹

As evidence of this enforcement policy, the Requester included with the Request five exhibits; only the first one will be set out here.²² The first exhibit includes two documents. The first document is a reply letter dated January 5, 1988, addressed to Richard S. Rosenberg, from former Labor Commissioner, Lloyd W. Aubry, Jr. The Labor Commissioner states therein:

"The Division has historically taken the position that unless employees are relieved of all duties and are free to leave the premises, the meal period is considered as 'hours worked.' [Emphasis added.]"

The second document is a declaration by C. Robert Simpson, Jr., another former Labor Commissioner. This declaration was submitted in support of DLSE's opposition to a preliminary injunction regarding the same enforcement policy challenged in this determination proceeding. The declaration was also apparently enclosed with the letter to Mr. Rosenberg. In the declaration, Mr. Simpson states at paragraphs 3 and 4:

"3. It is the policy of the [DLSE] that whenever an employer has employees under his dominion, direction or control, that employer is required to pay for the employee's time.

"4. Whenever an employer requires his employees to remain on premises for meal periods he is exerting control and must pay for that time as 'hours worked' even if the employees are relieved of all other job duties. [Emphasis added.]"

The Requester argues in summary that

"The DLSE enforcement policy concerning the mandatory treatment of off-duty meal periods as hours worked clearly constitutes a 'regulation' within the meaning of the APA and should be invalidated. The DLSE's substantive rule was not promulgated or adopted in accordance with the provisions of the APA even though the DLSE is an agency subject to the APA and the enforcement policy establishes new and specific legal standards that apply to every employer in the state that is subject to the Wage Orders. . . . [Emphasis in original.]"²³

On March 16, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,²⁴ along with a notice inviting public comment.

On April 26, 1990, OAL received DLSE's Response to the Request for Determination. DLSE's arguments will be addressed below.

II. ISSUES

There are three main issues before us:²⁵

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DLSE'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED POLICY IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED POLICY FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO DLSE'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."²⁶ Since DLSE is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the it.²⁷

We are aware of no specific²⁸ statutory exemption which would permit DLSE to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED POLICY IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]"
[Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule of the state agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁹ The enforcement policy is clearly a standard of general application. It is applied to all employers who are subject to the Commission's orders.

The answer to the second inquiry is "no."

In general, when an agency merely applies the law that it is charged with administering or enforcing and does not add to, interpret or modify that law, then the agency may legally inform interested parties of the law and its application. Such an action by the agency is nonregulatory and is simply "administrative" in nature. If, however, the agency makes new law, i.e., supplements or further interprets a statute or provision of law, such activity is deemed to be an exercise of quasi-legislative power.

In its Response, DLSE argues that the challenged enforcement policy is merely an application of the law that it is charged with enforcing. DLSE also argues that the enforcement policy is an application of the law to a particular set of facts, and that the application is the only legally tenable interpretation; i.e., whenever an employer requires his or her employees to remain on the employment premises during a meal period, the employer is exerting control over the employees, even if the employees have been relieved of all duties, and therefore, the employer must compensate the employees for the meal period as "hours worked."

The term "Hours worked" is defined as "time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Emphasis added.) There is no doubt that when an employer requires his or her employees to remain on the employment premises during meal periods that the employer is exerting control over the employees, even when the employees are relieved of all duties. We conclude that the challenged enforcement policy is the only legally tenable interpretation, and therefore is not a "regulation" as defined in Government Code section 11342, subdivision (b).

While we agree with DLSE and find that the enforcement policy is merely DLSE's application of the law to a particular set of facts, without further interpreting or supplementing the law, we find it necessary to express our disagreement with other points made by DLSE in its Response.³⁰

There is no question that DLSE has the statutory authority to enforce the Commission's orders or that DLSE is statutorily required to "make available to the public any enforcement policy statements or interpretations of orders of the [Commission]." ³¹ This statutory authority and requirement, however, does not exempt DLSE enforcement policies from the scope of the APA, which argument DLSE would like OAL to accept.³² Government Code section 11346 specifically states that APA requirements are applicable to any exercise of quasi-legislative power unless expressly exempted by the Legislature.

DLSE presents the argument, as it has in prior determination proceedings, that DLSE enforcement policies are not subject to the APA. As support for this argument, DLSE cites, again, Skyline Homes, Inc. v. Department of Industrial Relations,³³ which states

"Similarly, in this case, DLSE is not promulgating regulations. The regulation is wage order 1-76,

properly promulgated by the [Commission]. The DLSE is charged with enforcing the wage orders, to do so, it must first interpret them. The enforcement policy is precisely that--an interpretation--and need not comply with the APA."³⁴

We reject this argument hear as we have done in the prior OAL determinations--one concerning the California Coastal Commission, and two concerning the Labor Commissioner.³⁵ We reject the proposition that Skyline gives state agencies carte blanche to avoid compliance with the APA.

Another argument presented by DLSE is that the letter to Mr. Rosenberg from former Labor Commissioner Aubry, and the declaration of former Labor Commissioner Simpson are documents that

"are simply responses to requests for information. In the case of the letter of Commissioner Aubry, the document is a response to a request for an opinion regarding the interpretation of the IWC Orders which the employer could anticipate if enforcement became necessary. The response is mandated by law. In the case of the Declaration of Commissioner Simpson, the response simply states the historical position of the Division which, incidentally, represents the only logical interpretation of the IWC Orders definition of the term 'Hours Worked'."³⁶

DLSE further states

"The provisions of Labor Code [section] 1198.4 make it perfectly clear that the DLSE is required '[u]pon request] to make available to the public any enforcement policy statements or interpretations of orders of the [Commission]. There can be no question that the DLSE has the authority to enforce the IWC Orders. A statement by the DLSE that it will interpret the IWC Orders in a particular manner in the event of an court action does not require compliance. Consequently, any enforcement policy statement or interpretation, whether in the form of a letter, a declaration, an interpretive bulletin or procedure memorandum to the Division personnel which deals with the enforcement of the IWC Orders are not subject to the APA."

Whether a state agency rule constitutes a "regulation" hinges upon its effect and impact on the public,³⁷ not on the agency's characterization of the rule or the document which contains the rule. We therefore reject the above argument by DLSE.

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WE THEREFORE CONCLUDE THAT THE CHALLENGED ENFORCEMENT POLICY IS NOT A "REGULATION" AS DEFINED IN THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), AND THUS IS NOT SUBJECT TO THE REQUIREMENTS OF THE APA.

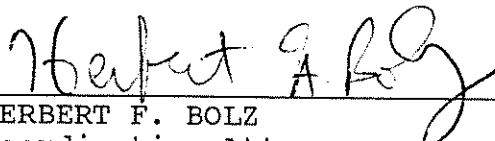
Having reached the conclusion that the enforcement policy is not a "regulation," it is not necessary for us to undertake the third inquiry of whether the policy falls within any established exception to APA requirements.

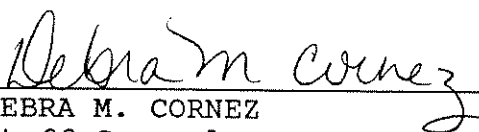
III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) DLSE's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged policy is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b), but is merely an application of existing law to a particular set of facts without further interpreting or supplementing the law; and therefore,
- (3) the policy does not violate Government Code section 11347.5, subdivision (a).

DATE: July 31, 1990


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1. This Request for Determination was filed by Richard J. Simmons, Esq., of Musick, Peeler & Garrett, One Wilshire Boulevard, Los Angeles, CA 90017, (213) 629-7600. The Division of Labor Standards Enforcement, Department of Industrial Relations, was represented by H. Thomas Cadell, Jr., Chief Counsel, 30 Van Ness Avenue, Suite 4400, San Francisco, CA 94102, (415) 557-2516.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in type-written format by OAL, is "306" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

- (1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449 (the Second District Court of Appeal -- citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) -- refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); reviewed denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"Determination" means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, sub-

division (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal.App. 3d at ___, 268 Cal.Rptr. at p. 251.

In regards to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]'

[Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.) 219 Cal.App.3d at ____, 268 Cal.Rptr. at p. 247.

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

DLSE's Response to the Request for Determination was received by OAL on April 26, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.
 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 2. The proceeding began prior to the party's request for the office's determination.
 3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Labor Code section 50.
11. Labor Code section 79.
12. Statutes 1976, chapter 746, sections 16 and 17.

13. Labor Code sections 79 and 82. The Labor Commissioner is also the Chief of the Division of Labor Standards Enforcement.
14. Labor Code section 61.
15. Labor Code section 98.
16. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. Labor Code section 55 grants the director of the Department of Industrial Relations ("department") general rulemaking authority. Section 55 provides in part that:

" . . . Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department [T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 56 provides:

"The work of the department shall be divided into at least six divisions [one is] known as . . . the Division of Labor Standards Enforcement"

Labor Code section 59 provides:

"The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 61 provides:

"The provisions of Chapter 1 [Wages, Hours and Working Conditions] (commencing with Section 1171) of Part 4 of Division 2 shall be administered and enforced by the department through the Division of Labor Standards Enforcement."

18. Labor Code section 70.
19. See Labor Code section 1173.
20. The following sections of Title 8, CCR, set forth the orders regulating wages, hours, and working conditions of the particular industry or occupation:

Section 11010 governs the Manufacturing Industry.

Section 11020 governs the Personal Service Industry.

Section 11030 governs the Canning, Freezing, and Preserving Industry.

Section 11040 governs Professional, Technical, Clerical, Mechanical, and Similar Occupations.

Section 11050 governs the Public Housekeeping Industry.

Section 11060 governs the Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry.

Section 11070 governs the Mercantile Industry.

Section 11080 governs the Industries Handling Products After Harvest.

Section 11090 governs the Transportation Industry.

Section 11100 governs the Amusement and Recreation Industry.

Section 11110 governs the Broadcasting Industry.

Section 11120 governs the Motion Picture Industry.

Section 11130 governs the Industries Preparing Agricultural Products for Market, on the Farm.

Section 11140 governs Agricultural Occupations.

Section 11150 governs Household Occupations.

21. Request for Determination, p. 8.

22. The first exhibit is set out in the text of the determination. The other four exhibits include: (1) a portion of a training manual concerning the Public Works Employment Act of 1977, (2) DLSE Policy/Procedural Memo 77-3 concerning the application of Industrial Welfare Commission orders to organized camps and day camps, (3) DLSE Policy/Procedural Memo 78-1 also concerning the application of Industrial Welfare Commission orders to organized camps, but reflecting the changes invoked by the enactment of Labor Code section 1182.3 (SB 408), and (4) section 10.69 of DLSE's Operations and Procedures Manual concerning wages and student employees of organized camps.

The Requester argues that these other four exhibits show that in certain situations DLSE has not required employers to pay for meal periods as "hours worked" when the employees are required to remain on the employment premises during meal periods, i.e., ambulance drivers, organized camps. After reviewing these exhibits, the applicable law and DLSE's Response, we find that DLSE's enforcement policy has been consistently applied except where the law allows for such exemptions.

23. See Request for Determination, pp. 21-22.

The Requester also argued that DLSE's enforcement policy "is flatly contradicted by the well-established regulations [see 29 C.F.R. section 785.19] that have been adopted under the federal wage and hour law, the Fair Labor Standards Act of 1938 ("FLSA")." Request, p. 10. "In short, the case law and regulations under the FLSA that have existed for decades firmly hold that meal periods during which employees are confined to their employers' premises do not constitute hours worked." Request, p. 14.

To this argument, DLSE responded that the federal regulations interpreting FLSA are not binding on DLSE, which is responsible for interpreting and enforcing state IWC orders, for the following reasons: (1) FLSA does not specifically define "hours worked" except as the term applies to time spent "changing clothes" and "washing" in employments covered by collective bargaining agreements; (2) IWC orders define "hours worked," whereas FLSA defines "workweek," which definition does not include "time during which an employee is subject to control of an employer"; and (3) federal regulations adopted by a federal agency to enforce a federal law is not binding on a state agency that is responsible for interpreting and enforcing a state law that is patterned on the federal law. (Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 726, fn. 1, 245 Cal.Rptr. 36, 39, fn. 1, citing Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453, "The Alcala court noted, that since California's wage laws are patterned on federal statutes, federal cases construing those federal statutes provide persuasive guidance to state courts [emphasis added].")

We agree with these arguments made by DLSE and find that the federal regulations interpreting FLSA are not binding on DLSE in interpreting IWC wage orders.

24. California Regulatory Notice Register 90, No. 11-Z, March 16, 1990, p. 425.
25. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

26. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
27. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
28. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as the "internal management" exemption.
29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
30. Though time does not allow us to address in the text of the determination each argument raised by the Requester and DLSE, we did review them all thoroughly. We conclude that none of the arguments, including a number of peripheral arguments, would not require us to reach a different result here.
31. Labor Code section 1198.4.
32. DLSE's Response, p. 5.
33. (1985) 165 Cal.App.3d 239, 211 Cal.Rptr. 792.
34. Id., 165 Cal.App.3d at 253, 211 Cal.Rptr. at 800.

35. 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-34--B-35; typewritten version, pp. 8-10.
- 1987 OAL Determination No. 4 (Department of Industrial Relations, Division of Labor Standards Enforcement, March 25, 1987, Docket No. 86-010), California Administrative Notice Register 87, No. 15-Z, April 10, 1987, pp. B-33--B-34; typewritten version, pp. 8-9.
- 1987 OAL Determination No. 7 (State Labor Commissioner, May 27, 1987, Docket No. 86-013), California Administrative Notice Register 87, No. 24-Z, June 12, 1987, p. B-45, typewritten version, pp. 9-11.
36. DLSE's Response, p. 9.
37. Winzler & Kelly v. Department of Industrial Relations, supra, note 27.
38. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.